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Letter to Roger J. Traynor Regarding *Larry Dickinson & Gibbs Adams v. United States of America*

Ralph Otwell
Chicago Sun-Times

27

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RALPH OTWELL
MANAGING EDITOR

November 9, 1973

Justice Roger Traynor
2643 Piedmont Avenue
Berkeley, California 94704

Dear Justice Traynor:

Here is a summary of the Baton Rouge, Louisiana, prior restraint case in which the Supreme Court recently denied a petition for writ of certiorari. I thought you might be interested in how the attorney representing the American Society of Newspaper Editors and Sigma Delta Chi saw the case, and particularly the rather ominous conclusions he poses on the last page.

With best regards,

Sincerely yours,

Ralph

Ralph Otwell

RO:jp
Enclosure
cc: Mr. William Arthur

COHN AND MARKS

Re: Dickinson and Adams v. United States of America

The United States Supreme Court on Tuesday, October 23, denied a Petition for Writ of Certiorari in the case of Larry Dickinson & Gibbs Adams v. United States of America. This is the Baton Rouge, Louisiana prior restraint case. The vote of the Supreme Court in refusing to hear this case was 8 to 1, with only Justice Douglas dissenting.

Sigma Delta Chi and the American Society of Newspaper Editors both filed an amicus curiae brief supporting the two reporters and their employer, the publishers of the Morning Advocate and the State Times in Baton Rouge.

As a result of the Court's action, the decision of the Fifth Circuit Court of Appeals remains in effect. This opinion can now be relied upon by other Courts throughout the nation to determine the rights of reporters. The following are the relevant facts in the case:

1. Frank Stewart, a civil rights worker, was indicted in Louisiana State Court on a charge of "conspiracy to murder" Woodrow W. Dumas, Mayor of Baton Rouge. Stewart then filed a suit for injunctive relief and damages in the United States District Court against the acting District Attorney and others, alleging that the State proceeding was not brought with any expectation of securing a conviction, but rather to harass Stewart in order to suppress his exercise of First Amendment rights. The matter was heard by Judge E. Gordon West, a U.S. District Judge, who denied a preliminary injunction. The U.S. Court of Appeals remanded the case to the lower Court with instructions that a hearing on Stewart's request for preliminary injunction be held.

2. During a hearing before the U.S. District Court on November 1, 1971, Judge West, on his own motion, entered the following order:

> "And, at this time, I do want to enter an order in the case, and that is in accordance with this Court's Rules in connection with Fair Trial Free Press provisions, the Rules of this Court.

> It is ordered that no, no report of the testimony taken in this case today shall be made in any newspaper or by radio or television or by any other media. This case will, in all probability, be the subject of further prosecution; at least, there is the possibility that it may. In order to avoid undue publicity which could in any way interfere with the rights of the litigants in connection with any further proceedings that might be had in this or other courts, there shall be no reporting of the details of any evidence taken during the course of this hearing today.
>
> This order is made subject to the sanctions provided by law in the event of any violation of this order.
>
> Now, gentlemen, by that I do not mean that the press cannot report the fact that a hearing has been held or that a hearing is being held, but it's obvious that the testimony here today could impede another court in its progress toward selecting a jury in this case if such became necessary. Consequently I do not want - and this order means that there shall be no reporting of the details of the evidence taken in this court today or in any continuation of this trial - of this hearing."

3. The two reporters for the Baton Rouge papers who regularly covered the courts were in open court on November 1. The reporters, believing that Judge West's order violated their First Amendment rights, wrote newspaper articles which were published in the State Times on November 1 and the Morning Advocate on November 2. Both were factual reports of the proceedings which had taken place in open court and admittedly violated the terms of the court's order.

On November 8, 1971, the reporters were convicted of criminal contempt and were fined $300 each. A notice of appeal was filed on the same day to the United States Court of Appeals for the 5th Circuit.

4. On August 22, 1972, the United States Court of Appeals for the 5th Circuit held that the order of Judge West prohibiting the publication of testimony taken in open court, was invalid as contrary to the First Amendment of the United States Constitution.

The court also held that, nevertheless, the defendants were subject to punishment for contempt, even though the order they violated was a violation of the U.S. Constitution. The court then reversed the judgment of the conviction and remanded this matter for additional consideration by the U.S. District Court "for a determination of whether the judgment of contempt or the punishment therefor will still be deemed appropriate in light of the fact that the order disobeyed was Constitutionally infirm."

On remand Judge West again convicted defendants in the case and imposed the $300 fines.

5. Again, an appeal was taken to the U.S. Circuit Court of Appeals and the Court of Appeals affirmed the lower court judgment. Thereupon a Petition for Certiorari was filed in the United States Supreme Court. The American Society of Newspaper Editors and Signma Delta Chi entered appearances and filed briefs as amicus curiae before the U.S. Supreme Court. On October 23, 1973, the U.S. Supreme Court refused to review the lower court's opinion.

6. In the Petition for Certiorari the appellants have pointed out that the Supreme Court has stated that:

> "a trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in preceedings before it." Craig v. Harney, 331 U.S. 367 (1947).

The Supreme Court has repeatedly reaffirmed that concept. All the parties concerned in the field pointed out that the District Court's order is patently invalid on its face. Even the 5th Circuit acknowledged this when it stated:

> "Enforced silence in the name of preserving the stirility of a future trial can suffocate the First Amendment, particularly when the very issue then on trial is the serious charge of flagrant, willful abuse of power. Tabulating

> this rich history, these factors add up to our compelled conclusion that the District Court's order banning publication of matters transpiring in open court is Constitutionally unacceptable, and hence illegal."

But then, the Circuit Court went on to say:

> "The conclusion that the District Court's order was Constitutionally invalid does not necessarily end the matter of the validity of the contempt convictions. There remains the very formidable question of whether a person may with impunity knowingly violate an order which turns out to be invalid. We hold that in the circumstances of this case he may not."

7. The appellants argued that the District Court's order was doubly invalid since it also illegally operated as a "prior restraint" on free speech. The order, if it had been followed, would have delayed publication of fresh, pressing news items, until such time as a higher court could overrule it after litigation. That to require news reporters to cease publication of immediate news events pursuant to a prima facie invalid court order, until such time as the order could be reviewed and reversed by a higher court, has a "chilling effect" even beyond that of a criminal statute.

As the Supreme Court had pointed out in the case of New York Times v. United States, "any system of prior restraint of expression comes to this court bearing a heavy presumption against its Constitutional validity."

The Solicitor General of the United States, in answering the petition in the Supreme Court, conceded the invalidity of the District Court's decree, but urged, however, that the contempt conviction should be affirmed. They ignored completely the legal implication of the fact that this case dealt with a prior restraint of the press.

8. Both the government and the 5th Circuit addressed themselves to the problems of "News Is Today's News". The 5th Circuit stated:

> "Where the thing enjoined is publication and the communication is 'news', this condition presents some thorny problems. Timeliness of publication is the hallmark

> of 'news' and the difference between 'news' and 'history' is merely a matter of hours. Thus, where the publishing of news is sought to be restrained, the incontestible inviolability of the order may depend on the immediate accessibility of orderly review. But in the absence of strong indications that the appellate process was being deliberately stalled - certainly not so in this record - violation with impunity does not occur simply because immediate decision is not forthcoming, even though the communication enjoined is 'news'."

The government contended that review by the Appellate Court would have been "speedy and effective but orderly." The reporters pointed out that they filed their notice of appeal from the District Court's contempt conviction on September 8, 1971. The Court of Appeals order invalidating the judge's injunction against the press and remanding the case to the District Court for consideration of the contempt conviction in view of its invalidation of the underlying order, was not remanded until August 22, 1972, more than nine months later.

CONCLUSION

The above sequence of events leads to the following questions:

A. Must news reporters or newspapers undertake costly litigation to review orders such as that entered in the Dickinson and Adams case?

B. Shall they refrain from publishing reports on court's proceedings pending a review of invalid restraining orders? If not, must they suffer the penalties imposed by a Court for contempt of its order?

C. If the Court can restrain the publication of news reports about Court proceedings, can they also impose contempt fines and jail sentences because they disagree with the manner in which the report has been presented?

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October 24, 1973